Supreme Court, U. S.

APPENDIX

In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1942

RICHARD ERZNOZNIK, as Manager of the
University Drive-In Theatre,

Appellant,

- v -

CITY OF JACKSONVILLE

**APPEAL FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA**

FILED ~~JULY~~ June 26, 1974
PROBABLE JURISDICTION NOTED
OCTOBER 15, 1974

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PLEADINGS IN TRIAL COURT

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

No. 72-3430

Division - L

RICHARD ERZNOZNIK, as
Manager of the University
Drive-In Theatre,
Plaintiff,

-vs-

CITY OF JACKSONVILLE,
a municipal corporation,
Defendant.

(Filed April 11, 1972)

COMPLAINT

Plaintiff, RICHARD ERZNOZNIK, hereafter called "Eerznoznik," brings this action for a Declaratory Judgment pursuant to Florida Statutes, Sections 86.011, 86.021, et seq., against THE CITY OF JACKSONVILLE, hereafter called "The City," and says:

1. January 14, 1972, The City adopted an Ordinance -- designated Chapter 71-552-519 -- hereafter called "The Ordinance," purporting to criminalize -- as a public nuisance -- exhibition at "Drive-In Theatres" of "Films Visible from Public Street or Public Places" -- in which "the human male or female bare buttocks, human bare breasts, or human male or female bare pubic areas are shown' -- the full text of which reads:

"BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. The Ordinance Code of the City of Jacksonville is amended by adding the following Section 330.313:

330.313 *Drive-In Theaters, Films Visible from Public Streets or Public Places.* It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, (R. 1) human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense. *USDs 2-5 Excepted.*" Chapter 71-552-519.

2. March 13, 1972, a summons was served on Erznoznik, as Manager of the University Drive-In Theater, charging him with violating the Ordinance by showing a film "Class of '74" -- on allegations that he:

> ". . . did knowingly exhibit a motion picture in which the human female buttocks and bare breasts were shown, and said scenes were visible from a public street and a public place, to-wit: Resurrection Catholic Church, located on Jack Road, Jacksonville, Duval County, Florida. Said violation being contrary to Chapter 71-552-519 of the Ordinance Code of the City of Jacksonville, Florida."

The same film was shown simultaneously January 28 through February 3 at the University Drive-In Theatre, the Cedar Hills Theatre, and the Royal Palms Theatre . . . the latter two being indoor theatres . . . and an additional week in the Royal Palm Theatre, February 4-10 -- all commonly owned and operated by Eastern Federal Corporation.

3. Erznoznik was commanded to appear -- and appeared before the Municipal Court at 1:30 p.m., April 6, 1972 -- the Honorable Judge Raymond L. Simpson, presiding -- for arraignment.

4. At the request of Erznoznik -- and upon stipulation of The City's prosecutor, Wayne Ellis -- Judge Simpson postponed the arraignment until April 20, 1972, at 2:30 o'clock p.m., subject to an undertaking by Erznoznik to commence a proceeding for Declaratory Judgment within one week after the date postponement was ordered.

5. It was stipulated further between Erznoznik and Ellis -- and assented to by Judge Simpson -- that the criminal prosecution in the Municipal Court should be held in abeyance pending final disposition and entry of a Declaratory Judgment on The Ordinance's constitutionality. (R. 2)

6. Accordingly, the instant action has been brought and Erznoznik asserts and challenges that The Ordinance is unconstitutional and invalid in that it:

a. Purports to make unlawful the exhibition of a non-obscene motion picture at a drive-in theatre which may not be made unlawful when exhibited at an indoor theatre because of the protection afforded by the First Amendment of the Constitution of the United States;

b. Purports to make criminal and authorize the suppression of a motion picture protected by the First Amendment of the Constitution of the United States on the pretense that such an exhibition constitutes a public nuisance;

c. Purports to denounce as a public nuisance -- not within the protection of the First Amendment of the Constitution of the United States -- the exhibition of a motion picture merely containing scenes showing "the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas," notwithstanding that such scenes, as a matter of law, cannot be demonstrated to be "ma..ifestly injurious to the morals or manners of the people" of The City, thus The Ordinance exceeds the constitutional and statutory powers of The City to define and suppress public nuisances;

d. Purports to declare criminal and a public nuisance an act that is not criminal nor a nuisance in fact;

e. Purports to make criminal -- as a public nuisance -- the exhibition of a motion picture at a drivein theatre containing scenes of "the human male or female bare buttocks, the human female bare breasts, or the human male or female bare pubic areas," notwithstanding that it cannot be demonstrated that such scenes tend to corrupt the public morals or manners of the people of The City and therefore the classification is arbitrary and unreasonable as a matter of law; (R. 3)

f. Purports to impose strict or absolute criminal liability upon the showing of motion pictures at drive-in theatres containing scenes as described in the preceding subparagraph, notwithstanding that the First Amend-

ment to the Constitution of the United States mandates that scienter be proven to support a prosecution intended to suppress such a motion picture;

g. Purports to make criminal the exhibition of a motion picture -- as described in the preceding subparagraph -- visible from a public place or public street, without definition thereof -- and thus is unconstitutionally vague for failure to give fair notice as to the conduct proscribed.

WHEREFORE, Erznoznik prays a Declaratory Judgment finding and declaring that The Ordinance is unconstitutional for the reasons stated above and therefore may not be used to furnish basis of a criminal prosecution against him. (R. 4)

* * * * *

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

[Title Omitted]

ANSWER

COMES NOW the Defendant, City of Jacksonville, by its undersigned attorneys, and answers the complaint as follows:

1. Defendant admits that it adopts the ordinance referred to in paragraph 1 therein.

2. Defendant admits that the plaintiff was charged with a violation of the ordinance in the manner set forth in paragraph 2 thereof. With respect to the last sentence of paragraph 2, the defendant files simultaneously herewith a Motion to Strike.

3. The City of Jacksonville is without knowledge with respect to the allegations of paragraphs 3, 4 and 5.

4. Defendant denies the allegations of paragraph 6. (R. 5)

* * * * *

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

[Title Omitted]

MOTION TO STRIKE

Defendant, City of Jacksonville, by its undersigned attorneys, moves the Court to enter an order striking from the complaint filed herein the following allegations on the grounds that said allegations are immaterial and impertinent:

1. The last five lines of paragraph 2 which reads as follows:

"The same film was shown simultaneously January 28 through February 3 at the University Drive-In Theatre, the Cedar Hills Theatre, and the Royal Palm Theatre . . . and an additional week in the Royal Palm Theatre, February 4-10 -- all commonly owned and operated by Eastern Federal Corporation."

2. All of paragraph 6(a). (R. 7)

* * * * *

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

[Title Omitted]

AMENDMENT OF ANSWER

The Defendant, City of Jacksonville, by its undersigned attorneys, pursuant to Rule 1.190, Florida Rules of Civil Procedure, files this Amendment to its Answer previously filed herein by substituting the following for paragraph 3 of said Answer:

"3. The City of Jacksonville admits the allegations of paragraphs 3, 4 and 5." (R. 9)

* * * * *

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

[Title Omitted]

SUPPLEMENTAL ANSWER IN ACCORDANCE WITH ORDER DENYING MOTION TO STRIKE

The Defendant, City of Jacksonville, a municipal corporation, through its undersigned attorneys, pursuant to the Order of this Court denying Defendant's Motion to Strike previouly filed herein, answers as follows:

Defendant is without knowledge as to the truth of the allegations contained in the last five lines of Paragraph 2 of the Complaint.

This Answer is intended to supplement and not supersede Defendant's original answer and Defendant's amendment to answer previously filed herein. (R. 11)

PLAINTIFF'S EXHIBIT I

SUMMONS

THE STATE OF FLORIDA
Duval County
CITY OF JACKSONVILLE

IN THE NAME OF THE
CITY OF JACKSONVILLE

To the Sheriff, Deputy Sheriff or any policeman of said City, GREETINGS:

Whereas, Officer K. D. Walker has on the 13th day of March, 1972, made oath before Alfred R. Taylor, Assistant State Attorney, in writing, that Richard Erznoznik as Manager of the University Drive-In Theater, located at 3425 University Boulevard, North, Jacksonville, Duval County, Florida, on the 29th day of January A.D. 1972, in the city aforesaid did knowingly exhibit a motion picture in which the human female buttocks and bare breasts were shown, and said scenes were visible from a public street and a public place, to-wit: Resurrection Catholic Church, located on Jack Road, Jacksonville, Duval County, Florida.

Said violation being contrary to Chapter 71-552-519 of the Ordinance Code of the City of Jacksonville, Florida, contrary to the ordinance in such case made and provided, and against the peace and dignitity of the City of Jacksonville. You are hereby commanded to summan Richard Erznoznik personally to be and appear before the Municipal Court Division, 711 Liberty St., in and for the said City of Jacksonville, Duval County, Florida at 1:30 P.M. on the 6th day of April, 1972. Courtroom #1

GIVEN UNDER MY HAND AND SEAL this 22nd day of Mach 1972.

/s/ RAYMOND L. SIMPSON
Judge of the Municipal Court

Attest:

S. MORGAN SLAUGHTER
Clerk of the Circuit and
Municipal Courts

BARBARA BOWMAN
Deputy Clerk (SEAL)

[(R. 12A) - Omitted from "Record-On-Appeal" in District Court of Appeal.]

* * * * *

CERTIFICATE

SERVICE OF SUMMONS

Received this summons on the 22nd day of March A.D. 1972 and executed the same in the County of Duval, Florida, on the 22nd day of March A.D. 1972 by delivering a true copy thereof to Richard Erznoznik, University Drive-In Theater Mgr., and at the same time explaining the contents thereof.

/s/ J. D. Austin
Police Officer
State Attys. Office

DEFENDANT'S EXHIBIT NO. I

ORDINANCE 71-752-519

AN ORDINANCE DECLARING CERTAIN EXHIBITIONS AT DRIVE-IN THEATERS TO BE UNLAWFUL AND A PUBLIC NUISANCE; PROVIDING PENALTIES FOR VIOLATION OF ITS PROVISIONS; PROVIDING AN EFFECTIVE DATE

BE IT ORDAINED by the Council of the City of Jacksonville:

Section 1. The Ordinance Code of the City of Jacksonville is amended by adding the following Section 330.313:

330.313 *Drive-In Theaters, Films Visible from Public Streets or Public Places.* It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher, motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theater in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture, slide, or other exhibit is visible from any public street or public place. Violation of this section shall be punishable as a Class C offense. *USDs 2-5 Excepted.*

Section 2. *Effective Date.* This ordinance becomes effective upon signature by the Mayor or upon becoming effective without the Mayor's signature. (R. 13)

[Filed in Evidence 12-20-72]

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

TRIAL PROCEEDINGS
ORIGINAL RECORD

Volumne II

TESTIMONY AND PROCEEDINGS taken before the Honorable Major B. Harding, Circuit Judge, in Chambers, on December 20, 1972, in the Duval County Courthouse, Jacksonville, Florida, and as recorded by Kathryn P. Parsons, Special Assistant Official Court Reporter.

APPEARANCES:

WILLIAM H. MANESS, Esquire, attorney for plaintiff.

RALPH W. NIMMONS, Esquire, Assistant City Counsel, attorney for defendant. (TT 1)

– – –

THE COURT: You gentlemen ready to proceed?

MR. MANESS: Ready for the plaintiff, Your Honor.

MR. NIMMONS: Defense is ready, Your Honor.

THE COURT: Very well. Would you like to make an opening statement?

MR. MANESS: Your Honor, I would, since we have had this on a motion for a judgment on the pleadings, I will be glad to waive an opening statement at this time and present testimony.

THE COURT: Very well.

MR. MANESS: Unless the Court wants –

THE COURT: It's up to counsel. Mr. Nimmons, would you like to make an opening statement?

MR. NIMMONS: I will waive opening statement, Your Honor.

THE COURT: All right. Who's your first witness?

MR. MANESS: Let me ask counsel, first of all, if he will permit me to offer in evidence without objection the original of a summons issued in the name of the City of Jacksonville in the case of City of Jacksonville vs. Richard Erznoznik as manager of the University Drive-In Theatre, which was served on Richard Erznoznik March 22nd, 1972. We'd like to introduce that in evidence as Plaintiff's Exhibition No. 1.

MR. NIMMONS: I have no objection, Your Honor. (TT 2)

THE COURT: Very well. This will be received as Plaintiff's Exhibit No. 1.

(The instrument last above referred to was received in evidence as Plaintiff's Exhibit No. 1.) [See page A-13]

MR. MANESS: And, Your Honor, we'd like to ask that Mr. Perry Revis, who is seated on my right be sworn, and his testimony won't take over five minutes.

THE COURT: All right. Would you raise your right hand, please, and be sworn.

PERRY REVIS,

was produced and sworn as a witness on behalf of the plaintiff and having been first duly sworn, testified as follows:

THE COURT: And would you be kind enough to take the seat at the end of the table.

DIRECT EXAMINATION

BY MR. MANESS:

Q Please state your name.

A Perry Revis.

Q Where do you live?

A At 1103 Bellemeade Boulevard, Jacksonville.

Q What is your business or occupation?

A I am district manager for Eastern Federal Corporation.

Q What are your duties as such district manager? (TT 3)

A I supervise the operation of our local theatres.

Q Is one of your local theatres the University Drive-In Theatre?

A Yes.

Q And on March the 13th, 1972, who was the manager of your University Drive-In Theatre?

A Mr. Erznoznik, Richard Erznoznik.

MR. MANESS: May I have this, Your Honor?

The COURT: Uh-huh.

BY MR. MANESS:

Q On March 22nd, 1972, did your manager hand to you Plaintiff's Exhibit No. 1, which is the summons which was served on him by the sheriff?

A Yes, sir.

Q At my request, did you transmit that summons to my office?

A I did.

Q At the time of the transmittal of that summons to my office, did you also send with it a letter to me?

A Yes, sir.

Q I show you the letter solely for the purpose of refreshing your recollection and ask you whether or not at that time you made a memorandum of the other places that the movie Class of '74 played other than the University Drive-In Theatre on March 13th, 1972. (TT 4)

A Well, the memorandum --

Q Just yes or no.

A Yes.

Q Was the letter transmittal in your hand -- that memorandum?

A Yes.

Q And was that memorandum made on March 23, 1972?

A It was.

Q The day after the service of this summons?

A Right.

Q And was the information you compiled in that letter correct at that time?

A Yes.

Q And is it still correct, having refreshed your recollection?

A Yes.

Q Now, referring to Plaintiff's Exhibit No. 1, which was a summons served on Mr. Erznoznik, are you familiar with the fact that the charges set forth in that summons grew out of the showing of a movie called the Class of '74?

A Yes.

Q All right. What theatres did the movie -- strike that. On or about March 13th, 1972, at what other theatres other than the University Drive-In Theatre was the Class of '74 displayed by Eastern Federal Corporation? (TT 5)

A At the Cedar Hills Theatre and the Royal Palm Theatre in Atlantic Beach.

Q Now, what were the dates of showing at those theatres?

A Okay. January 28th through February 3, the picture played in three theatres including the University Drive-In, Cedar Hills Theatre and Royal Palm Theatre. It played an additional week in the Royal Palm Theatre, February 4 through February 10.

Q Now, is the University Drive-In Theatre an outdoor theatre?

A Yes.

Q Is the Cedar Hills Theatre an outdoor or indoor theatre?

A Indoor.

Q Is the Royal Palms indoor or outdoor?

A Indoor.

MR. MANESS: I have no further questions.

MR. NIMMONS: I have no questions, Your Honor.

THE COURT: All right.

MR. MANESS: You can come back.

Your Honor, now, in view of the fact that the complaint and the answers thereto admit all of the factual allegations except the conclusions of law set forth in Paragraph 6 and except for the last five lines (TT 6) in Paragraph 2, the substance of which has just been testified to by Mr. Revis, the plaintiff rests its case -- his case.

MR. NIMMONS: Your Honor, may it please the Court. The defendant, City of Jacksonville, pursuant to -- sorry, Your Honor -- I didn't know that we would be at this point this --

MR. MANESS: Rules of civil procedure.

MR. NIMMONS: Your Honor, pursuant to Rule 1.420, Subparagraph B of the Florida Rules of Civil Procedure, the defendant moves the Court for the entry of an order granting an involuntary dismissal on the grounds that on the facts and the law, the plaintiff who is seeking affirma-

tive relief has shown no right to relief.

Now, Your Honor, I'd like to, in support of that motion, kind of summarize the present posture of the pleadings in this case and give you my interpretation of the pleadings, of why I feel like the Court is required to enter an order granting the motion. The complaint, Your Honor, recites in Paragraph 1 that the city adopted an ordinance. That's the ordinance in question. And it is recited verbatim in the complaint. We admit that.

Paragraph 2 simply recites in the first portion of it, simply recites the fact that this particular (TT 7) plaintiff was charged with a violation of that ordinance on March 13th, 1972, and it sets forth the substance of the charge and, of course, Plaintiff's Exhibit 1 is the actual summons.

The latter portion of Paragraph 2 alleges that the film was shown at other theatres, indoor theatres during the certain period of time. There has been evidence before the Court to that effect.

Paragraph 3 and 4 simply recite that Mr. Erznoznik was commanded to appear before the Municipal Court and that there was an attempt for a delay until such time as plaintiff might file a declaratory judgment action in this court.

And Paragraph 5 further states that the prosecution in Municipal Court would be held in abeyance pending the final resolution of that declaratory judgment action, should it be filed.

Paragraph 6, Your Honor, which has several subsections, basically are allegations of law, conclusions of law. And with the exception, Your Honor, of Subparagraph C wherein

the plaintiff seeks to describe what the effect of the ordinance is and the latter phrase is included which says, "Notwithstanding that such scenes as a matter of law cannot be demonstrated to be 'manifestly injurious to the morals or manners of the people' of the (TT 8) city and therefore the classification is arbitrary and unreasonable as a matter of law."

Now, Your Honor, with those exceptions, Paragraph 6 simply recites allegations of law or conclusions of law. There has been no testimony whatever presented by the plaintiff to support any such allegations. The plaintiff has the burden of proof in this action. And I would like to now turn to some legal authority, Your Honor.

Starting off with the -- basically the deference which we submit the Court is required to give to legislative acts of the city council wherein it has after due consideration determined that showing those portions of the human anatomy from a screen, an outdoor screen visible from public streets and public places is indeed a nuisance, a public nuisance.

First of all, Your Honor, we would first contend that the nuisance in question is a nuisance per se as opposed to a nuisance accidens -- a-c-c-i-d-e-n-s. Frankly, I have never come across that before this particular litigation.

MR. MANESS: Your Honor, I object. I object to the argument pitched at the question of public nuisance since there is no testimony or evidence before the Court that there has been shown a public nuisance existing in Duval County anywhere. The statute seeks to (TT 9) denounce the showing of those portions of the human body on theory

that it constitutes a public nuisance, but as a matter of fact, there is no evidence that it is a public nuisance.

MR. NIMMONS: Your Honor, the point is that the ordinance itself, the legislative act is a finding by the legislature that this particular type of activity is a public nuisance. And, it would be incumbent upon the plaintiffs in this cause to show that it is not. And I was getting to the legal presumptions and the law pertaining to that because I think that we are at that posture now and I certainly think the argument is appropriate on it.

MR. MANESS: Let me make one more statement and I will be quiet, Your Honor.

We have under consideration the constitutionality of a criminal statute. And it is never the duty of the defendant in a criminal case to carry the burden of proving his innocence. And we make our prima facie case for declaratory decree when we show the enactment of the ordinance and the effort to prosecute under it where it is as we contend unconstitutional on its face.

So, it would not be proper to assume that we have the burden of proving that it's not a nuisance when the ordinance itself is a criminal statute or criminal (TT 10) ordinance.

MR. NIMMONS: Your Honor, speaking further to that, certainly if we were bringing this -- bringing the action in equity under the general public nuisance statute which of course doesn't say anything with respect to portions of the human anatomy or outdoor drive-in theatres, but certainly a civil action could be brought in the Circuit Court seeking to have enjoined as a public nuisance anything which may be shown to be a public nuisance.

Now, that's not what this action is. This action is a declaratory judgment action brought by plaintiffs in this cause and we have a far different statute in this case by virtue of the fact that we do have the legislative determination that these particular limited facts are indeed a public nuisance.

And, the legislative body of the City of Jacksonville City Council has so determined and that is before the Court by the pleadings. Your Honor --

THE COURT: Well, now, before we go any further now, what is your argument? You are getting ready to go into your argument in reference to the effect of that --

MR. NIMMONS: Yes, sir.

THE COURT: -- declaration --

MR. NIMMONS: Yes, sir. (TT 11)

THE COURT: -- on these proceedings?

MR. NIMMONS: Yes, sir.

THE COURT: The objection will be overruled and you can proceed.

MR. NIMMONS: Your Honor, extremely appropriate to this particular question is a portion starting with Section 24.86 of the multivolume work on municipal corporations by McQuillin which is the Bible for municipalities and municipal law, I submit. And that section -- and I will, if you will indulge me, Your Honor, because it is particularly apropos read from that section.

MR. MANESS: Section what?

MR. NIMMONS: 24.86.

"It is generally agreed that a municipal determination" -- and, incidentally, this section is entitled In Doubtful Cases as opposed to the nuisance per se which I will get to in a moment. And so, what I am suggesting is even if this is a nuisance per accidens or nuisance per the facts, we submit that even if that's the case, that we are entitled to a judgment in this case and that the plaintiffs have not carried their burden. "It is generally agreed that a municipal determination and declaration of a nuisance per accidens or in fact will not be disturbed by the Court where the (TT 12) case is a doubtful one or where, in other words, reasonable minds could differ as to whether the thing, use, activity or condition in question is a nuisance in fact. Accordingly, it has been said: 'In doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances, requiring judgment or discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action, under set circumstances, will be conclusive of the question. There are many innoxious useful things which the municipal authorities of a town or city could not lawfully, under a general grant of power, like the one in question, declare a nuisance -- such, for instance, as the exercise of certain trades and callings, as that of a physician, druggist and the like. In all such cases as these, Courts, acting upon their own experience and knowledge of human affairs, would say, as a matter of law, the exercise of these trades or callings, or things of like character, are not nuisances, and that any attempt so to declare them by the municipal authorities would be unwarranted abuse of their power.

On the other hand, there are many things which courts, without proof, will, on the same principle, (TT 13) declare nuisances. Such, for instance, would be the digging of a pit, or the erection of a house, or other obstruction, in a public highway; and, an ordinance passed by a town or city having, as in the present case, a general power over the subject, declaring such obstruction nuisances, would be valid on its face, and a conviction might properly be had under it, without any extrinsic proof to show the act complained of was in fact a nuisance. In all such cases it is sufficient to show the existence of the fact constituting the nuisance.'

In an English case it is said that 'Where a thing is of a character that it can be a nuisance or can be an annoyance, then it is almost always for the local authority which has the power to make the bye-law to show whether it shall be considered to be a nuisance and an annoyance in the particular locality in respect of which they make the bye-law. The Court will say the bye-law may be unreasonable if they think the act forbidden could not be a nuisance; but they will not as a rule, if they think it could be a nuisance, interfere with the discretion of the local authority as to whether or not it should be forbidden in that particular locality.' "

Now, Your Honor, we would also submit that this conduct which is felt to be prescribed by the ordinance (TT 14) that is showing on a screen visible from public places human genitalia, bare breasts, or bare buttocks is indeed a nuisance per se. We are, I hasten to add, that we are not contending and we do not have before the Court any contention that such exhibitions would be improper where

they were not foisted off upon the public including adults as well as minors.

So, Your Honor, we think it's legitimate to urge upon the Court that this particular conduct is a nuisance per se. And McQuillin has this to say about that situation, Section 24.85: "Without doubt municipal determination and declaration that something is a nuisance is conclusive on the court, where one thing is a nuisance per se or at common law or under statute. For example, the deposit of offal, garbage, the carcasses of dead animals within the city, and the obstruction of streets and sidewalks for the display of goods, are of this class. In this class of cases the exercise by the municipality of the legislative authority to declare what shall be a nuisance is usually conclusive of the question."

Now, and then they go into doubtful cases. We would and if the Court considers whether it is legitimate to place these portions of the anatomy on a big screen (TT 15) visible from public places, even if the right of the legislative authority to declare that to be a public nuisance is quote doubtful end quote that the Court must give deference to the legislative body in accordance with the general law on this subject.

Now, we are not dealing with the question of obscenity. We cannot be drawn and should not be drawn into having to prove any of the legal definitions of obscenity, but before I get to that, I again reiterate, Your Honor, that and I think particularly pertinent are these allegations, these two allegations in Paragraph 6 where they say, where the plaintiffs say that "Notwithstanding that such scenes as a matter of law cannot be demonstrated to be manifestly injurious to the morals or manners of the people" and "Notwithstanding that it cannot be demonstrated that such scenes tend to corrupt the public morals or manners of the people."

Apparently the plaintiffs are arguing that as a matter of law under no circumstances can the exhibition of such scenes from such a location be demonstrated to corrupt the morals or manners of the citizens and we think that if the plaintiffs are taking that attitude and that posture in this case that in accordance with the general law on the subject as cited from McQuillin that the Court must grant our motion. (TT 16)

Further, Your Honor, we would also cite to the Court the case of State vs. County of Dade. And this was a bond validation proceedings. Your Honor, but the Court had this to say at Page --

MR. MANESS: What citation?

MR. NIMMONS: Excuse me. 210 Southern 2nd, Page 200. The Supreme Court had this to say at Page 203: "It is the duty of the Court to honor the legislative act unless we are convinced beyond a reasonable doubt that it contravenes the Constitution of our state."

The question involved in that case was the power of the Dade County Port Authority to issue certain bonds in that case. And there were allegations in the suit by the defendant that this was not within the power of the port authority to issue such bonds and further there was -- there were allegations concerning bond safe and proper motive and that there were other programs which were

more worthy of consideration than spending the money or issuing the bonds on that particular purpose.

Likewise, Your Honor, in City of Opalocka vs. State, wherein the Third District Court of Appeals stated: "Whenever an act" -- at Page 104.

THE COURT: What?

MR. NIMMONS: 257 Southern 2nd, at Page 100, and this is at Page 104. (TT 17)

"Whenever an act of the legislature is challenged in court, the inquiry is limited to the question of power. It does not extend to the manner of expediency, the motives of the legislators or the reasons which were pled before them to induce the passage of the act."

The same principle applies in the main two municipal legislative bodies. And, to like effect, Your Honor, is the Supreme Court decision of S-c-h-a-u-e-r vs. City of Miami Beach, 112 Southern 2nd, Page 838. And generally, it states the identical proposition at Page 840.

Further, Your Honor, from the charter of the City of Jacksonville which is, I believe, where the legislative act was and I should know that chapter, 67-1320, but I will have to check that. Under Article 3, concerning the powers given to the City of Jacksonville, it is contained in Section 3.02 under specific powers and particularly Paragraph 10, wherein it says: "To make regulations and to take actions to promote the general health, welfare and safety of the inhabitants and to prevent, abate and remove nuisances."

I submit that it's under that power, Your Honor, that

the City of Jacksonville has acted. Your Honor, we also would urge upon the Court the proposition that what we are talking about -- (TT 18)

MR. MANESS: Excuse me, Mr. Nimmons. I'd like to ask a question. When this started out, I assumed this was a motion for a directed verdict at the close of the plaintiff's case. Is this, is this intended to be a motion of the close of all the evidence or just at the close of the plaintiff's case?

MR. NIMMONS: Close of the plaintiff's case.

MR. MANESS: Okay.

MR. NIMMONS: Yeah. Your Honor, we think that there is an abundant authority and it should be plainly clear that a municipality has the right, indeed, I would suggest the duty to prescribe and prohibit the type of thing that they have sought to do by this ordinance. I don't think that anyone would seriously contend that a citizen of the community would have the right and the prerogative to purchase billboard space and put a nude male or female on a billboard particularly where it's visible from a public street or a public place.

Likewise, what is the difference between what the plaintiffs in this case are seeking to do by placing the type of scenes on their theatre screen visible from public places from permitting an individual to simply walk out into a public street or public place nude. And I think particularly significant and interesting here, Your Honor, is the particular statement made by (TT 19) one of our most -- one of our staunchest supporters of civil libertarianism, Mr. Justice Douglas in the Roth case in 1957 at 1 Law Edition

2nd, at Page 1522. I don't have the official Supreme Court cite on that.

THE COURT: Fifteen --

MR. NIMMONS: Page 1522. And Mr. Justice Douglas dissented from the majority opinion of the Court in which the majority sustained certain obscenity convictions and in his dissenting opinion he pointed out: "No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct" end quote.

More specifically, Your Honor, we, as authority for doing the type of thing that the City of Jacksonville has seen fit to do, the Case of Chemline, Inc. vs. City of Grand Prairie, 364 Federal 2nd, Page 721. This is a Fifth Circuit Court of Appeals case which was decided in 1966 and the panel which decided this case were Judges Rives, Brown and Moore. In that case the Court discussed and upheld an ordinance which was practically identical to the ordinance in question.

That ordinance read: "It shall be unlawful for any licensee, ticket seller, ticket taker, usher, motion picture machine operator and any other person connected with or employed by any licensee to show or (TT 20) exhibit at a theatre in the city or to aid or assist in such exhibition any motion picture, slide, or other exhibit which is visible from any public street or highway in which the bare buttocks or the bare female breasts of the body are shown or in which striptease, burlesque or nudist-type screens constitute the main or primary material of such movie, slide, or exhibit."

Now, Your Honor, our ordinance does not include that latter clause, and frankly, Your Honor, in drafting the particular ordinance, this ordinance was followed almost to the letter. However, that last clause was left out, "Or in which striptease, burlesque or nudist-type scenes constitute the main or primary material" so forth. Frankly, if that were included, I think that that would lend a little bit more credence to the argument of vagueness. I certainly do not think that this ordinance can be attacked on the grounds of vagueness, but in any event, this was the particular ordinance that the Fifth Circuit Court of Appeals had before it. The Court, in part, said at Page 724: "It is almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks' or 'bare female breasts' or 'striptease, burlesque or nudist-type scenes which (TT 21) constitute the main or primary material.'"

The Fifth Circuit found some authority in the Jacobellis v. State of Ohio case, 1964, in which case Mr. Justice Brennan recognized the legitimate interest of the states and localities to protect the interest of children and that it does not have to be obscenity in order to regulate that sort of material.

And the Fifth Circuit stated that quote: It seems to us that the city has followed the suggestion of the Supreme Court and has enacted an ordinance reasonably aimed at preventing the exhibition of objectionable pictures to children, end quote. Now, certainly our ordinance nor the one in the Grand Prairie case or Chemline case were children alluded to, but obviously the ordinance will protect children who certainly will be in public places or on public

streets and will see the type of thing that's being put on the movie screen.

So, Your Honor, we feel that the Chemline case is still, is right on point. Now, incidentally, let me point out, I -- I suggest that in spite of what counsel for the plaintiff might assert, the fact that the ordinance in Chemline was an ordinance which if violated gave the city the right to revoke a city license to operate a drive-in movie theatre as opposed to a penal ordinance such as ours makes no difference whatever inso- (TT 22) far as the right of the municipality to enact such ordinances. The -- as a point of interest, Your Honor, the Second Circuit Court of Appeals in United States vs. One Carton Positive Motion Picture Film Entitled "491", 367 Federal 2nd, 889.

THE COURT: 367?

MR. NIMMONS: 367 Federal 2nd, 889.

The Second Circuit Court of Appeals had before it certainly a distinguishable type of situation in that it was a federal proceeding on forfeiture of a Swedish motion picture film, but inasmuch as it cited with approval the Chemline case and had the following to say, I would like to quote this, a brief portion to Your Honor at Page 898: "The communities throughout the country are not without protection. They may adopt such reasonable moral codes as they may find appropriate to their own 'community standards.' Witness the recent legislation in New York," referring to a particular statute, "prohibiting sales to minors of certain specifically described pornographic material. The power of the New York State Legislature to pass these actions was recently upheld by the highest court of New York. And an ordinance of Grand Prairie, Texas, prohibit-

ing the exhibition of any film visible from a public street or highway wherein the bare breasts and bare buttocks are (TT 23) shown has recently been upheld." Citing the Chemline case in the Fifth Circuit.

Your Honor, the Supreme Court has in its obscenity cases clearly made quite clear that its many holdings in reversing obscenity cases would have been much different if the case before it had to do with either a foisting off upon the public or an unwilling audience type of situation.

THE COURT: Let me ask a question at this point without intending to preclude you. It was my understanding at the hearing which we had on the motion for a judgment on the pleadings that there were questions of fact and that you being the city were in a position to demonstrate that such scenes tended to corrupt the public morals or manners of the people of the city and it was to that point and the fact that there was the allegation in regard to the showing of the film at the University Drive-In Theatre and the two indoor theatres, questions of fact which had not been resolved by the complaint and the answer.

Now, from -- am I reading from your argument that really there is no question of fact, that the matter can be resolved solely upon the basis that the city passed an ordinance, the city summonsed the defendant to the municipal court in violation of that ordinance and the (TT 24) matter can be resolved solely and on the pleadings?

MR. NIMMONS: Your Honor, our position was this: At that hearing the plaintiffs filed a motion for judgment on the pleadings. They affirmatively alleged at that hearing that such a film under such circumstances would not and could not injure the morals or manners of the people.

Now, that was an affirmative allegation on their part, Your Honor, and we took it as such. And we felt and still feel that that must be shown by the plaintiffs, Your Honor, and therefore, the case, we felt, was not in posture for a judgment on the pleadings. There was no evidence presented by the plaintiffs before the Court to make a determination.

Now, we anticipated that the plaintiffs may have very well brought in testimony to prove their allegations in the complaint, but in any event, Your Honor, we took the position and I think rightly so that that was an allegation of fact on the part of the plaintiff that was not admitted and that therefore the suit was not in a posture for a judgment on the pleadings.

Now, the plaintiffs have come in and they have not presented any testimony whatever. Now, it may very well be that and, of course, the other -- the other fact which has been shown that the movie was being played in other (TT 25) theatres, I think, I would submit is irrelevant, but the main reason why we took the position that the case was not in a posture for judgment on the pleadings was that they hadn't put any evidence before the Court on the disputed facts that they have alleged in these two portions.

THE COURT: Well, counsel at the last hearing for the plaintiff indicated that by his allegations in Paragraph 6, I believe it is --

MR. MANESS: C, isn't it C and E?

MR. NIMMONS: C and E, I believe.

THE COURT: C and E. So to speak, put you to the burden and there was some discussion about the difficulty

of proving what something is not, rather than what something is --

MR. NIMMONS: Well, I was here. I think I attended the whole entire hearing -- excuse me, Your Honor.

THE COURT: And, and it was my understanding from that that there was some statement, I don't recall whether it was record l or not or whether reported or not or whether it was binding upon you at this time, but you felt that there was proof that these were manifestly injurious to the morals and the manners of the people of the city.

MR. NIMMONS: Well, Your Honor, I seem to recall that, (TT 26) and of course Mr. Pillans from our office was handling that particular hearing, but I was here and I think I paid pretty close attention, but my understanding was that his argument was to the effect that this is an affirmative allegation by the plaintiffs and it may very well be that this can be shown or it can be shown not to exist.

In any event, I didn't take it to be an assumption by the city of the burden of proving what may be material allegations of the plaintiff's complaint.

MR. MANESS: May I comment on that? Your Honor, my recollection was that I argued with the Court that there was no genuine issue made by the pleadings. Mr. Pillans responded, "Oh, yes, it is. On a motion for a judgment on the pleadings, everything that's admitted is taken as true and everything that's denied is taken as untrue."

And, therefore, he argued that Paragraph 6, the denial of these factual statements made an issue that the city was entitled to present testimony on it if wished to do so. I

argued at the time that, "No, these aallegations of fact are really arguments of law, that they are arguments." I say, for instance, they cannot as a matter of law be shown demonstratively to be manifestly injurious, but in the final analysis I had to conclude that if the Court considered those to be allegations of (TT 27) fact which I was making then, there was a genuine issue or rather the case was not in a posture for disposition, but I argued then and I argue now that what he's picking out of here as my allegations, are in fact part of my arguments on the law as we contend it is.

MR. NIMMONS: But, Your Honor, if in fact -- what he's saying is now I take it to be what he's saying that under no circumstances can it be demonstrated that such scenes would tend to corrupt the morals of the citizens, then it may very well be that we boil this thing down to a question of law. I don't think that we have any question before the Court on the constitutionality of this ordinance as applied to this particular plaintiff. I just don't see where that is before the Court at all.

I frankly thought that possibly these types of allegations here might be used, particularly in light of Mr. Maness' argument in his memorandum in support of his motion for judgment on the pleadings when he alluded to the ordinance as applied to him and in which, frankly, there were some facts that were stated in memorandum that were not before the Court and were not alleged in the pleadings. So, I don't feel that we are -- have taken any position which is not unreasonable to have taken in this case, but it may be that in view of the representa- (TT 28) tions to the Court now that we may have boiled this thing down to a pure question of law.

THE COURT: Well, he argued that it was simply and purely a question of law and he was entitled to a ruling based solely upon the pleadings. But now, as I recall, Mr. Pillans said that, "We have evidence that this is manifestly injurious and it is not a matter of law and it is a question of fact."

And that they would like to have some time to present evidence to that.

MR. MANESS: That's true. And I argued that they didn't make that a ground of this ordinance. They didn't, they didn't make such a showing a part of the ordinance and I argued that, "Well, even if they had such evidence, it would be irrelevant."

MR. NIMMONS: Judge, I -- I am -- I have since discussed this in preparation for the trial with Charlie and if he said that which I don't recall in those terms, that is in effect assuming the burden of showing the things, I would be very surprised and it's inconsistent with my conversations with him in preparation for the trial.

THE COURT: Well, I don't intend to bind you up. The only thing is that he was insisting that as a matter of law these allegations were not so. The plaintiff has (TT 29) couched them in terms of being a letter of law and as opposed to a matter of fact.

MR. NIMMONS: Well --

THE COURT: And so, I guess what I am saying, if this is in fact a factual issue and you contend that it is a factual issue, I will permit you to put the testimony on in regard thereon. But, he has alleged that it's a matter of law.

MR. NIMMONS: Well, I don't -- in the first place, I don't really feel that it is a factual issue unless they place it in issue. If he's agreeable to submitting --

THE COURT: Well, he's been agreeable all along. That's what -- that's the only reason --

MR. MANESS: That's right.

THE COURT: -- I permitted the matter to come back again rather than ruling on it before was because you, the city, kept insisting that it was a factual matter.

MR. NIMMONS: Well, Judge, my recollection was that the Court had before it the motions for judgment on the pleadings. The Court looks at the complaint, the allegations in the complaint and the answers. We obviously are going to deny those particular allegations. That doesn't necessarily mean that we recognize that it's a material fact, but we don't know what the Court is going to rule on that. (TT 30)

THE COURT: Right.

MR. NIMMONS: So, I just -- I recall this as simply an opposition to their motion for a judgment for plaintiffs on the pleadings where we stated that they had not shown this and this is a fact which is in issue before the Court, that the plaintiffs alleged it and we denied it. Now --

THE COURT: But, he specifically and if he had left out the words as a matter of law or qualified it, we may well be in a different posture.

MR. NIMMONS: Well, Your Honor, I think that kind of puts us in an unreasonable situation where the plaintiffs are alleging such things as that he has alleged and I think

that's kind of a fine line. So, I don't think we are to be faulted in --

THE COURT: Nobody wants to place you in a position of being faulted. What I was just becoming concerned with the exigencies of the situation as far as time and all was concerned that we be able to dispose of the matter.

MR. NIMMONS: Right.

Judge, could we take a short recess? I would like -- for about ten minutes?

THE COURT: Yes. That would be very fine with me.

MR. NIMMONS: And kind of evaluate in my own mind (TT 31) where we are right now and to determine whether we want to put on anything at all. And as opposed to maybe just submitting the thing to the Court.

THE COURT: Of course, it may be nothing more than a confusion of fact that he has alleged this as a matter of law.

MR. NIMMONS: Well, you can see where our -- in answering that --

THE COURT: Well, I can understand that. We will be in recess then until about 3:15.

(Brief recess.)

MR. NIMMONS: Your Honor, during the recess I wanted to call Mr. Pillans and I did in fact talk with him. I Just wanted to try and clear up in my own mind what his impressions were. He did not mean to say anything to the Court other than number one, he felt like these were affirmative allegations of the complaint and certainly the

city would not admit to those and that therefore, there was a question of fact there that were framed by the pleadings and certainly the city, if the plaintiffs were going to present any testimony in support of that allegation which now Mr. Maness says is a conclusion of law or argument of law, that certainly the city would want to present testimony counter to that. Now, this is what he certainly -- he, of course, doesn't recall (TT 32) exactly what he said, but this is what he intended to convey to the Court and that is what my impression was as to what went on. But, that's --

THE COURT: That, if in fact these were allegations that were supported by evidence --

MR. NIMMONS: Yes, sir.

THE COURT: -- that you wanted to be given the opportunity --

MR. NIMMONS: Yes, sir.

THE COURT: -- to present evidence to the contrary?

MR. NIMMONS: That's right. That's right.

Now, as I understand it, those are not factual allegations of the complaint, but are simply allegations or argument that under no circumstances can it be demonstrated that bare breasts can corrupt the morals of anybody viewing it from outside the premises; is that a fair statement?

MR. MANESS: That is a fair statement. But, furthermore, see, the fact that I closed my case without putting any evidence on in support of whatever Paragraph 6 is is indicative that I don't consider it a factual matter.

MR. NIMMONS: Yeah, well, now, we are in the position, Your Honor, of -- and I think that our position is well-taken and if you are, I think we have got a duty (TT 33) to make that position at the close of the plaintiff's case. And, if the Court rules against us on that motion that the plaintiff has after the close of his case shown no affirmative right to relief under the law and the facts, then if you, if you move -- if you rule against us, that's tantamount to ruling that if we don't put on anything, then you are going to rule against us. Do you follow me? I mean, if you --

THE COURT: No. It's not tantamount to that in the context in which I see --

MR. NIMMONS: Well, we'd -- we had a similar type of posture in the bus litigation a couple of weeks ago in which we made a similar motion and we were well --

THE COURT: Let me say this: That when you have concluded the argument on your motion that the Court will withhold ruling on the motion and allow the matter to proceed.

MR. NIMMONS: All right, sir.

THE COURT: And that won't be tantamount to anything.

MR. NIMMONS: Okay. Let me just check over the pleadings again and see what factual disputes we have before the Court. Now, may I ask counsel for plaintiffs, Your Honor, whether he would be agreeable to the actual ordinance coming into evidence?

MR. MANESS: No objection.

THE COURT: The ordinance will be received as (TT 34) Defendant's Exhibit 1.

(The instrument last above referred to was received in evidence as Defendant's Exhibit No. 1.)

MR. NIMMONS: And, Your Honor, it's my understanding that the Court can take judicial notice of an act of the legislature and specifically I am referring to that particular charter provision covering the powers of the city. That --

THE COURT: What is the specific citation on that?

MR. NIMMONS: Your Honor, I believe that it's Chapter 67-1320 of the Laws of Florida, 1967.

And, I would refer the Court specifically to that particular provision under Article 3, Section 3.02, Subparagraph 10, which I quoted to Your Honor previously.

THE COURT: That's an act relating to the powers of city council?

MR. NIMMONS: Yes, sir; of the City of Jacksonville.

THE COURT: Okay.

MR. NIMMONS: All right. Your Honor, we would call Officer Ed Emanuel.

THE COURT: All right. Please take the seat at the end of the table. Raise your right hand.

EDGAR EMANUEL,

was produced as a witness on behalf of the defendant, and having been first duly sworn, testified as follows: (TT 35)

DIRECT EXAMINATION

BY MR. NIMMONS:

Q Give us your name, please.

A Edgar Emanuel.

Q What is your occupation, sir?

A Investigator assigned to the Office of the Sheriff, Jacksonville, Florida.

Q Officer Emanuel, what specific duties do you have in the Sheriff's Office?

A I am assigned to the vice squad, work licensed premises and pornography.

Q Officer Emanuel, have you had occasion to visit the premises at or around the University Drive-In Theatre in Jacksonville?

A I have, sir.

Q And Officer Emanuel, have you at my request drafted a diagram of the general area in that vicinity?

A I have, sir.

Q Now, what does that -- does this purport to be?

A This is the area of the University Drive-In Theatre. The residential area's directly behind it, surrounding it.

Q And when did you prepare that?

A I prepared it today, sir.

Q All right. Now, that portends to show the approximate location of the drive-in theatre screen, does it (TT 36) not?

A Yes, sir. This is not to scale. It's just rough.

Q All right.

MR. NIMMONS: Would counsel agree to this coming into evidence?

MR. MANESS: Let me ask my client.

MR. NIMMONS: Show that to him, please.

MR. MANESS: Your Honor, we don't object to the document coming in evidence as a drawing to demonstrate the general area of the University Drive-In Theatre, but we object on the grounds that it's immaterial and irrelevant and not germane to any of the issues made by the pleadings in this case.

MR. NIMMONS: Well, Your Honor --

THE COURT: All right. The objection will be overruled. It will be received as Defendant's Exhibit No. 2.

(The instrument last above referred to was received in evidence as Defendant's Exhibit No. 2.)

BY MR. NIMMONS:

Q Officer Emanuel, did you also have occasion to take certain photographs?

A I did, sir.

Q At that location?

A I did, sir. (TT 37)

Q That is in that area?

A Yes, sir.

Q All right. Take a look at those, please. Now, would you describe basically that photograph there and then I will submit that to counsel. I'd like for him to describe each one of these and then --

MR. MANESS: I will just watch him.

BY MR. NIMMONS:

Q All right. Officer Emanuel. What does that photograph attempt to show?

A This is a photograph taken in the westerly direction on George's Lane of the paved portion of George's Lane.

Q All right. When was that taken?

A It was taken this morning, sir.

MR. NIMMONS: All right. We will offer that into evidence, Mr. Maness.

MR. MANESS: I have no objection to the character of the exhibit, Your Honor, just to its materiality and relevance and it's not germane to the issues.

THE COURT: Very well. Objection will be overruled. It will be received as Defendant's Exhibit 3.

(The instrument last above referred to was received in evidence as Defendant's Exhibit No. 3.)

MR. NIMMONS: I think maybe to save time I will just offer each one of these into evidence and then we (TT 38) will have him --

THE COURT: May I ask the witness a question?

MR. NIMMONS: Certainly.

VOIR DIRE EXAMINATION

BY MR. MANESS:

Q Is George's Lane a public street?

A Yes, sir.

Q It is?

A As far as I know, sir.

VOICE: It is.

MR. MANESS: All right. Thank you.

BY MR. NIMMONS:

Q And I take it that it runs, let's look at the map --

A Runs in an easterly direction.

Q I see.

MR. MANESS: We have no objection, Your Honor, to the pictures as purporting to show areas of the adjacent to or nearby the University Drive-In Theatre. We object to them on the grounds that they are immaterial and irrelevant and not germane to the issues made by the pleadings.

THE COURT: Very well. These will be received respectively as Defendant's Exhibits 4, 5, 6 and 7. (TT 39)

(The instruments last above referred to were received in evidence as Defendant's Exhibits Nos. 4, 5, 6 and 7.)

BY MR. NIMMONS:

Q When were these photographs taken?

A This morning.

Q And did you take them?

A Yes, sir.

Q Now, I am going to be referring to this photograph here which is Defendant's Exhibit No. 3, and I believe you testified that that picture shows --

MR. NIMMONS: Your Honor, I was just going to show it to him and then you have got the diagram there and then I was just going to hand that back to him and let him testify exactly where it was taken from for convenience.

THE COURT: All right.

MR. NIMMONS: Your Honor --

BY MR. NIMMONS:

Q I hand you Defendant's Exhibit No. 3, Officer Emanuel, would you state for the Court, please, where you were located and you might-- you might get up and show the Court exactly where you were located when you took that photograph, please.

A We were on George's Lane, like I say, this is not drawn to scale, but approximately halfway down the lane or more (TT 40) than halfway down.

Q Would you simply mark a No. 3 at the approximate location where you were standing when you took that photograph, please.

A Well -- (witness marking).

Q Similarly on Exhibit 7, would you place a No. 7 on that diagram as to the approximate location where you were standing.

A (Witness marking.)

Q And on Exhibit No. 4, similarly, would you --

A (Witness marking.)

Q -- describe where that was taken from, please.

A No. 7 was taken from the intersection of Justina Terrace and Pompano Drive. Exhibit No. 4 -- excuse me -- was taken from which -- I don't have that, but there is -- this is from the parking area of a public ball park which is right behind the church here. See, it would have been taken from this area right in here (indicating).

Q No , are these the buildings here that you have drawn in through which --

A Yes, sir.

Q -- the picture was taken?

A These represent these buildings visible in the picture.

Q And is that a public ball field? (TT 41)

A Yes, sir.

Q All right. Would you state then to the Court and do the same thing with reference to Exhibit No. 6.

A (Witness marking.)

Q Now, Exhibit No. 6 does not purport to show the movie screen, does it?

A No, sir. That was taken in an easterly direction.

Q All right. Now, would you tell the Court what is around this area here.

A This is the shoulder of the roadway. And this roadway, it was littered with beer cans, Coca-Cola paper cups, wrappings, I don't know what they are from and all, but just very littered with trash. Bottles, broken bottles.

MR. MANESS: Your Honor, I'd like to renew my objection to that particular photograph upon the grounds that it's not related to the -- even the visibility in the area, but apparently intended to prejudice the Court by showing that a drive-in theatre is itself a nuisance because of the litter that may be dropped by patrons.

THE COURT: What is the purpose of that, counsel?

MR. NIMMONS: Your Honor, we are prepared to show that this is an area where the teenagers congregate at a time when the R rated movies are shown and that in fact leave a great deal of litter on public places around that area. This is a place where there is a ready access (TT 42) viewing wise to the screen.

MR. MANESS: Your Honor, that strengthens my objections on the grounds that such a showing is improper

because we are not concerned with --

THE COURT: Litter.

MR. MANESS: -- litter or the congregation of teenagers or R rated movies at all.

MR. NIMMONS: Well, Your Honor, I think that what we may be concerned with here is this is supposed to be a public nuisance and there are any number of ways in which a particular attraction may be a public nuisance, whether --

THE COURT: Yeah, but you have spelled out in the ordinance which has been submitted into evidence, have you not, as to exactly the manner in which it is a public nuisance and that is a violation with which the defendant is charged in the municipal court.

MR. NIMMONS: Well, we are saying, Your Honor, that the exhibitions of such scenes where it can be seen from outside the premises specifically from public places may in any number of ways cause a nuisance effect upon the community and this is only one way.

MR. MANESS: Your Honor, I'd like to make the further objection that he has not alleged in his responsive pleadings -- response to pleadings that this theatre or (TT 43) what's being conducted at this theatre is a public nuisance because of any effect that it has on the morals or manners of the community or the behavior of the people around it.

THE COURT: Well, the objection will be sustained as to any testimony relating to litter other than matters as and of course what counsel has said in the way of what

he hopes to show is not evidence. But, the objection will be sustained and the evidence, which is Exhibit No. 6, will be only for the purpose of showing that you can see the screen from that point.

MR. NIMMONS: All right sir.

THE COURT: And is that likewise?

MR. NIMMONS: I think that may be likewise there, Your Honor.

THE COURT: As to Exhibit No. 5, the same.

MR. NIMMONS: Of course, this also shows areas where these groups of people gather, we submit, not necessarily also shows that they litter, but this has not been deemed to be relevant by the Court, but we --

MR. MANESS: Your Honor, I think -- excuse me -- the Court can take judicial notice of the fact that it's against the law in this country to litter anywhere and law enforcement agencies are duty bound to enforce the laws against litter and the fact that it's near a theatre (TT 44) does not incriminate the owners, operators of the theatre.

THE COURT: All right. Well, the Court has indicated --

MR. NIMMONS: All right, sir.

THE COURT: Get him to show on the drawing where 5 was.

BY MR. NIMMONS:

Q 5, where was 5 taken from, Officer Emanuel? Indicate by putting the figure on the diagram, please, of where it was taken.

A (Witness marking.)

Q All right. Officer Emanuel, have you had occasion to drive along Jack Road as shown on the diagram?

A I have, sir. I have, sir.

Q And as you were proceeding in an easterly -- in an easterly direction --

A Yes, sir.

Q -- on Jack Road, is there not a fence that is, that borders the southerly boundary of the premises of the University Drive-In Theatre

A There is, sir. (TT 45)

Q And as you were driving along that first block of University Boulevard -- of Jack Road, can you see any portion of the screen of the University Drive-In Theatre?

A You can, sir.

Q And approximately what percentage of the screen can you see or what portion of the screen can you see?

A Well, it was a certain point you turn east on to Jack Road from University, you can see the entire screen.

Q Is that for any -- for how long a period or rather how long a distance is that, roughly?

A That you can see the entire screen?

Q That's a brief portion, is it not?

A Well, this, the fence that is bordering the theatre is a cyclone type fence which is interwoven with strips of aluminum type material which is a multicolored material. The intersection of University and Jack Road, there is a building under construction and the fence more or less borders the back of that after you turn off there and you get -- there is an exitway here from the theatre on to Jack Road. When you get to approximately in the area of the exitway, you can look to your left or in a northerly direction and see the screen.

Q Would you put that X on that approximate location, please, where you can first see it over the fence.

A (Witness marking.)

Q All right. (TT 46)

A Approximately.

Q Go ahead.

A And then as you proceed in an easterly direction along Jack Road, if you, any point that you can stop there up to the intersection of George's Road, you can look to your left or either in a northerly direction and observe the screen.

Q All right. Now, have you also had occasion to visit the areas in front of the residences on George's Road as you have shown on the diagram?

A Yes, sir; I have.

Q And is the screen visible from that general location?

A Yes, sir.

Q And approximately how much of the screen can you see from those locations?

A You can see the entire screen, certain areas, there is a row of trees that have been faced here, I believe they are

Australian pines or something similar to that, some of them are just to the top of the fence and some of them are a foot or two above it. But, if you are on a rise out of the road, you can observe the screen.

Q All right. Now, Officer Emanuel, I believe you have also drawn in some buildings which are supposed to be Resurrrection Catholic Church?

A Yes, sir. (TT 47)

Q Now, is there a parking -- is there a black top area there for parking?

A Yes, sir. There is. There is -- there is a long area in here which is a parking area off of the street. There's another area that comes right in this vicinity which has a parking area and this surrounding it is grass.

Q All right. Would you put a big P at the point where the parking area is approximately located?

A (Witness drawing.)

Q All right. If you would put a figure 1 by that first P and a 2 by the other one -- now, P-1 has head-in parking at that --

A Yes, sir.

Q All right. Now, P-2, is that not rather large black top area?

A Yes, sir. It's bordered on one side by grass which is at an angle parking or is a large turn-around area.

QAll right. And are there any recreational equipment located at that black top area?

A Yes, sir. On the -- in this area approximately here there is a basketball court and there is also a basketball court or goals and all in the parking area.

Q On either side of the parking area?

A Well, there is one where it's designated on here as Parking Area No. 2, there is a goal post with a basket and all (TT 48) on it, but there is a regular basketball court in this area to the end of that building.

Q All right. And have you stood at that location and faced the direction of the screen of the University Drive-In Theatre?

A Yes, sir; I have.

Q And what can you see? Can you see the screen?

A Yes, sir. You can see the entire screen.

Q All right. Now, Officer Emanuel, you have not drawn in all of the --

A No, sir.

Q -- residences; is that correct, in this diagram?

A That's right. This area, this all along this road, this way and the more along Tarpon Court are all residential areas.

Q And are these houses on each side of each one of these courts that you have shown here?

A Yes, sir.

Q All right. Now, have you been to those various courts to see whether you could observe the screen from those locations?

A Yes, sir.

Q Would, now, I believe you have drawn some woods in this location?

A That's right. (TT 49)

Q Can you briefly describe from where you can see the screen?

A From Moray Court which makes a loop in these, you can walk through a yard into the end of George's Lane where it deadends into a yard. And, you can observe the screen from there. On Marlin Court, you can walk from the end of the court, very short distance into the woods and if you sat in a chair or either sat on the ground, you could observe the screen.

Q All right. Okay. Very well. Wait -- wait just a minute. Have you, Officer Emanuel, have you been out to that area of the University Drive-In Theatre in the evening when movies are being shown?

A Yes, sir.

Q And have you been out there at any times when movies are shown which have been showing bare female breasts?

A I have, sir.

Q And have you had occasion to observe individuals outside the premises parked in or around that area?

A Yes, sir.

MR. MANESS: Your Honor, I object on the grounds it's immaterial and irrelevant whether anyone's parked out there. The ordinance denounces the showing of bare female breasts and buttocks, et cetera, when visible from a public place. The testimony of this witness up to (TT 50) this point has certainly been towards the question of whether or not the screen and what's shown on the screen is visible from a public place. The fact is not in dispute. But, there is nothing denounced in the ordinance and it's immaterial and irrelevant to this cause who may be parked around looking through or trying to see this movie without paying an admission. It doesn't -- it doesn't denounce operating a theatre where people try to look through the fence.

MR. NIMMONS: Your Honor, if I might say this: Frankly, we were -- wanted to be prepared to put on testimony of this nature including testimony of two or three of the residents out there primarily designed to rebut any affirmative testimony that the plaintiffs might put on, so I am kind of between a rock and a hard place as far as arguing that particular motion. But, in view of the fact that the plaintiff has rested and Your Honor has taken it under advisement our motion, we are proceeding in this fashion.

THE COURT: I will permit you to go further and I would assume that what you are attempting to show is not only is it visible from a public street or a public place, but it is actually viewed?

MR. NIMMONS: Yes, sir. That's all we are trying to show. (TT 51)

THE COURT:

MR. MANESS: That's admitted, Your Honor, it's visible and viewed.

THE COURT: All right. I will -- he has the right, I think, in view of the fact I have taken a motion under advisement to proceed.

BY MR. NIMMONS:

Q And what have you -- would you answer that question if you recall it, best you can.

THE COURT: Have you seen people parked out there?

THE WITNESS: Yes, sir. I have observed them park in the area of the church back in the parking area No. 1 and also No. 2.

BY MR. NIMMONS:

Q Did it -- what were they doing?

A When I saw them, they were just sitting there.

Q And --

A Watching a movie, I presume.

Q All right. Now, Officer Emanuel, have you on the occasions that you have been out to those premises officially noticed anyone viewing the movie from outside the premises other than at that location?

A Yes, sir. But, it was right after this theatre opened.

Q All right. Have a seat, Officer Emanuel. (TT 52)

Officer Emanuel, would you at this particular location, there is a line here that --

A Yes, sir.

Q -- you have drawn. What does that line represent?

A That's; would be the northern fence of the drive-in theatre.

Q All right, sir. Now, what, if anything, is adjacent; that is, just north of that fence near George's Road?

A There is a --

Q In this location here?

A -- drainage ditch and then a wooded area.

Q All right. And what, if anything, have you observed with respect to that wooded area?

A It's littered with trash, beer cans --

Q Well --

A -- chicken wire.

MR. MANESS: I object, move to strike the question.

THE COURT: The objection will be sustained.

BY MR. NIMMONS:

Q Your Honor's already ruled on that. Does that area appear to be -- is there grass in that area?

A I don't know what type, there is wild grass, leaves, scrub oaks.

Q Is there any indication -- I will withdraw the question. (TT 53)

MR. NIMMONS: I have no further questions of this witness.

CROSS EXAMINATION

BY MR. MANESS:

Q Officer --

A Yes, sir.

Q Isn't it true that the theatre owners or someone on their behalf have painted -- have planted Australian pines around the entire fenced area?

A I don't know, sir. I haven't seen it from the inside. The only thing I can see is what I can see from the outside that is above the fence.

Q All right. And do you see the Australian pines above the fence all the way around?

A No, sir; not all the way around.

Q On what areas then do you find that there are Australian pines above the fence?

A Would be on George's Road on the back side.

Q Along George's Road and that's the view that leads directly to the --

A That is one of the views.

Q -- screen? One of the views?

A Yes.

MR. MANESS: No further questions.

MR. NIMMONS: That's all I have. (TT 54)

(Witness excused)

MR. NIMMONS: Call Sergeant James L. Pfeiffer.

JAMES L. PFEIFFER,

was produced as a witness on behalf of the defendant and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NIMMONS:

Q Sergeant Pfeiffer, would you identify yourself for the record, please.

A James L. Pfeiffer, detective sergeant, Office of the Sheriff, assigned as a special investigator to the state attorney's office.

Q Sergeant Pfeiffer, are you acquainted with the premises around the University Drive-In Theatre?

A Yes, sir; I am.

Q Have you been out there on more than one occasion?

A Yes, sir; I have.

Q And have you had occasion to cause to be taken a number of photographs in that area?

A Yes, sir; I have.

Q How long ago, approximately, were those photographs taken?

A Approximately a year ago.

Q And are these the photographs that you caused to be taken? (TT 55)

A Yes, sir; they are.

Q Sergeant Pfeiffer, did you visit the premises out there again this morning?

A Yes, sir; I did.

Q At my request?

A Yes, sir.

Q And did you take these photographs with you at the time?

A Yes, sir; I did.

Q Do you notice anything substantially different about any of those photographs than as the premises exist now?

A No, sir.

MR. NIMMONS: All right. We are going to offer these into evidence, Mr. Maness.

MR. MANESS: No objection, Your Honor.

THE COURT: Very well. They will be received as Defendant's Exhibit No. -- I think it's 8.

MR. MANESS: 8.

MR. NIMMONS: Yes, sir.

THE COURT: As a composite exhibit.

(The instrument last above referred to was received and filed in evidence as Defendant's No. 8.)

THE COURT: Do you want them back?

MR. NIMMONS: Yes, sir; please. I will try to make this as brief as possible. (TT 56)

MR. MANESS: Why don't you put him up next to the Judge so all of us can watch him at the same time?

MR. NIMMONS: All right. You want to step up here a moment like you did before, please.

BY MR. NIMMONS:

Q Sergeant Pfeiffer, would you describe that particular -- as to where that particular shot was taken from please.

A Yes, sir. This is the screen looking through the fence area on the northerly boundary of which is running perpendicular to George's Road.

Q Now, using this diagram here, with that being George's Road back here and the screen being here, would you point out to the Court the approximate location where that picture was taken from?

A Yes, sir. This would be sitting right here on this corner. This wooded area in here.

Q I see. On the -- at the approximate location of the northern boundary fence of the theatre with the westerly side of George's Road; is that correct?

A Yes, sir.

Q All right. And this particular photograph here, does -- what street is that there?

A That would be George's Road.

Q Where is that taken from roughly? (TT 57)

A This is taken behind these houses right in here where we walked behind them and shot a picture.

Q All right. Now, these particular photographs here, are they taken from the church?

A Yes, sir. This photograph right here depicting the two automobiles with the shaded area was taken next to the building of the church right outside here, Your Honor, in this area. As we say, we had gone looking from this area across the street from here to the screen. The other two photographs -- could you show me that one also -- three?

Q Yes, uh-huh.

A Well, these photographs, Your Honor, are taken from over in this paved parking area.

Q Is that the black top?

A The black top; yes, sir. Which has a basketball court on it which looks across the street there.

Q Okay. Sergeant, you want to have a seat, please. Have you, what, if anything, have you observed with respect to, out there at those premises on the occasions that you have been there with respect to persons viewing the screen or apparently viewing the screen from outside the premises?

A I have been out on several occasions while assigned to the state attorney's office in matters of investigation of possible violation of the obscene literature law, showing of obscene movies to minors -- (TT 58

MR. MANESS: Your Honor, I object and move to strike his last statement which would --

MR. NIMMONS: We would agree and stipulate on that.

THE COURT: Very well. Objection will be sustained. It will be stricken.

MR. NIMMONS: As to the purpose for the investigation.

BY MR. NIMMONS:

Q Proceed.

THE COURT: Yes.

BY MR. NIMMONS:

Q Proceed.

A All right. In the course of my assignment out there, I observed young people in the edge of the woods on the northerly boundary, as I pointed out, Your Honor, which has no -- these aluminum slats in the fenced area itself which is basically open to that wooded area, seated along on the ground in that area observing the movie.

MR. MANESS: Your Honor --

THE WITNESS: Of a --

MR. MANESS: Excuse me. I object to and move to strike the answer of this witness on the grounds it's immaterial and irrelevant who may be outside viewing or what they may be doing while they are viewing. It's not an issue in this case. It's not an issue in this case. It is visible and is viewed from public places in and around the outside of the theatre (TT 59) fence. And anything else is immaterial and irrelevant.

MR. NIMMONS: I am about through with this --

THE COURT: I think all he's testified to is that there were people there viewing it and the objection will be overruled.

THE WITNESS: Want me to continue?

BY MR. NIMMONS:

Q If you haven't finished your answer.

MR. MANESS: Wait a minute, Your Honor. I object. There is no pending question. Ask him again.

MR. NIMMONS: Well, I think he's still trying to finish his answer.

THE WITNESS: I was attempting to describe all of the area around there because I didn't see in one particular location -- observe the minors outside of the fence. Also on George's Lane --

MR. MANESS: Your Honor, I object on the -- this is purely voluntary. The minors outside the fence. And it's immaterial and irrelevant whether people he finds out there are minors or adults. We are not charged with creating a nuisance by attracting people to look through our screens who may behave in various ways as objectionable to us as anyone else. Now, the only purpose of this testimony is cumulative and it's designed to prejudice the Court to try to establish a (TT 60) nuisance in fact which is not denounced by the language of the statute under consideration.

THE COURT: I think the objection to the last statement of the witness is well-taken. Your original question,

as I understood it, was what did you observe around the fence when you did that, and it is -- the objection will be sustained other than as to where he saw the people.

MR. NIMMONS: All right, sir.

BY MR. NIMMONS:

Q Have you observed people viewing the screen from locations other than that that you have already described, Sergeant Pfeiffer?

A Yes, sir; I have.

Q And from where?

A From the George's Lane area, from the parking lot or black top area there by the church.

Q All right.

MR. NIMMONS: That's all I have of this witness.

CROSS EXAMINATION

BY MR. MANESS:

Q Mr. Pfeiffer, how many times have you been out to make these observations in the last year, we will say?

A I'd say approximately five times.

MR. MANESS: No further questions. (TT 61)

THE COURT: All right.

MR. NIMMONS: That's all I have.

THE WITNESS: May I be excused, Your Honor?

MR. MANESS: No objection.

MR. NIMMONS: No objection. Thank you.

(Witness excused.)

MR. NIMMONS: Mrs. Chaffe.

JOYCE CHAFFE,

was produced as a witness on behalf of the defendant, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. NIMMONS:

Q Would you give us your name, please.

A My name is Joyce Chaffe.

Q How do you spell that?

A C-h-a-f-f-e.

Q All right. Mrs. Chaffe, what is your address, please?

A 5678 George Court or George Lane, it's really George Court.

Q Uh-huh. Would you take a look at this digram which is our Exhibit No. 2 to get your bearings, please, ma'am. You have your bearings. All right. Would you point out to the Court where your house is?

A (Witness indicating.) (TT 62)

Q It's right here?

A Yes, sir.

Q On George Lane?

A Yes, sir.

Q And where is the front entrance to that house?

A Right there.

Q It fronts on Georges Lane?

A Yes, sir.

Q All right. Is yours the only house on that particular street?

A Yes, sir.

Q All right. And how long have you lived there?

A Nine years.

Q All right. Now, do you have children?

A Yes, sir. I have a son nine and I have a daughter 16 and I have another daughter 17.

Q All right. Now, Mrs. Chaffe, can you observe the screen of the University Drive-In Theatre from your house?

A Yes, sir; I certainly can. It's an embarrassment.

MR. MANESS: Wait a minute.

BY MR. NIMMONS:

Q Just answer the question.

MR. MANESS: I object and move to strike all the testimony of this witness on the grounds that it's cumulative, that's immaterial and irrelevant of where (TT 63) she

lives or how many children she has and her opinion of the screen being a bother to her or a blessing to her. It's just what she has to say is irrelevant to the issues that the Court has to decide.

MR. NIMMONS: Well, Your Honor, the point, main point in calling Mrs. Chaffe and I am getting to that is to bring out testimony as to the frequency of people, congregations of people viewing the screen from areas around her house, around the streets adjacent to her house.

THE COURT: Well, I think that this has been well brought out by the testimony.

MR. NIMMONS: That primarily would be the -- that, and also the burdens that the circumstances' causing or created by some of these films, particularly those that are purportedly in violation of that ordinance have caused the burdens that have been placed upon her and the inconvenience and so forth. That would be the primary purpose of her testimony, Your Honor.

THE COURT: Well, with that, while we may all admit that that may be so, would that be determinative of the issues?

MR. NIMMONS: Well, Your Honor, we -- I -- it's a difficult question for me to answer. I -- I don't really think that we frankly should properly be in the position (TT 64) of introducing such testimony in the first place. But, so I don't know that I am prepared to argue that point with the Court.

THE COURT: Well --

MR. NIMMONS: I don't, I don't really think that the

issues framed in the pleadings would require us to or even permit us to.

THE COURT: Well, this is what counsel for the plaintiff is contending. You have denied the allegations that as a matter of law --

MR. NIMMONS: Yes, sir.

THE COURT: And I think that what is germane to the fact is such, if such motion picture slide or other exhibit is visible from any public street or public place and the adjacent discomfort while it is certainly -- it certainly may be present, would not be determinative of the issues.

MR. NIMMONS: All right, sir. We have no further questions of this witness.

MR. MANESS: I have no questions of this witness.

MR. NIMMONS: Thank you very much, Mrs. Chaffe. And Mrs. Prosper.

MR. MANESS: I would have the same objection and I don't say that with any carelessness whatsoever, Your Honor. I know that Your Honor appreciates the fact that (TT 65) we are as unhappy about what can be seen from our screen as they are, but we can't build a wall around the building without an inordinate amount of expense and I feel that just as a matter, the Court can take judicial notice of the fact that only the city council has attempted to afford these citizens some protection and relief by passing the ordinance and the only question is whether or not, whether what they did meets constitutional standards.

THE COURT: That's right.

MR. NIMMONS: All right. The only other witness I have would be Mrs. Prosper, but I think the only thing that she -- the only purpose for which she would be called would be another location from which the screen can be seen and I think in view of the Court's ruling, I will not call her and the defense rests, Your Honor.

MR. MANESS: The plaintiff has no further testimony.

THE COURT: All right. Now, do you wish to argue the matter further other than what has been submitted in the argument on the motion for judgment on the pleadings and what has been submitted in your argument for directed verdict?

MR. NIMMONS: Your Honor, I really -- I didn't contemplate the argument that I would like to make and inasmuch as Mr. Maness has submitted a written memorandum (TT 66) and if the Court feels it would be appropriate, it might be advisable for me to prepare a memorandum of law.

MR. MANESS: Your Honor, I want to just take about two minutes to respond to the argument he made up to this point and otherwise, I am ready to leave the case in the same posture that I think it was in on a motion for the pleadings. I just want to point out that this is not a billboard case as he argued, but you couldn't show a nude person on a billboard.

The fact is that if this statute by its same language applied to a billboard that little suntan ad that I remember so well, the little dog pulling down the breeches of the little girl, would be denounced by this ordinance because it would be showing the bare male or female buttocks. Well, this is not a case of indecent exposure whether or not

a person can walk down the street nude. The question is merely whether the showing, it's whether the mere showing of the bare buttocks, bare breasts and so forth is a nuisance per se, not whether we have shown or that -- nor that it does tend to corrupt. The decree of protection of the children is not involved since the statute itself says, what is it, purports to find a nuisance. So, it's easy to argue other cases, but it's hard to get away from the fact that the issues before this Court is whether or not the mere showing in (TT 67) this instance can be denounced as a nuisance and we submit on the legal authorities we have previously assembled that it cannot. And, I'd just like a few days to answer his memorandum, if and when it's submitted.

THE COURT: Okay.

MR. NIMMONS: If Your Honor wishes to go ahead and rule on this matter, I could -- I would be happy to submit the authority verbally to the Court, but I am afraid that that might unduly burden the Court and I would be happy to prepare it in memorandum form.

THE COURT: Well, you have the matter obviously prepared so that a memorandum could be easily --

MR. NIMMONS: Yes, sir.

THE COURT: -- submitted to the Court. How long do you think you will need?

MR. NIMMONS: Well, I am going to have to be out of the office tomorrow. I have had a death in the family and it -- I would like --

MR. MANESS: May we go off the record?

THE COURT: Yes.

(Whereupon an off the record discussion was had.)

MR. NIMMONS: Your Honor, if we can have two weeks to submit our memorandum and we can have it in on or before then.

THE COURT: Very well then. Before the 5th of (TT 68) January.

MR. NIMMONS: Yes.

MR. MANESS: And may I have five days to answer his memorandum?

THE COURT: Likewise, you will be given until the 12th.

MR. MANESS: All right. I don't propose to write any more memorandums until I see his.

THE COURT: Very well.

(And thus the proceedings ended.) (TT 69)

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

Civil Action No. 72-3430

Division L

RICHARD ERZNOZNIK, as
Manager of the University
Drive-In Theatre,

Plaintiff,

vs.

CITY OF JACKSONVILLE,
a municipal corporation,

Defendant.

FINAL JUDGMENT

(Filed January 30, 1973)

(Vol. 3458, Pg. 617, Official Records)

This cause came on for final hearing before the Court, sitting without a jury, and having considered the testimony and arguments of counsel along with the legal memoranda filed herein makes the following findings of fact and conclusions of law.

Findings of Fact

1. On January 14, 1972, the City adopted Ordinance 71-552-519 which read as follows:

> "It shall be unlawful and it is hereby declared a public nuisance for any ticket seller, ticket taker, usher,

motion picture projection machine operator, manager, owner, or any other person connected with or employed by any drive-in theatre in the City to exhibit, or aid or assist in exhibiting, any motion picture, slide, or other exhibit in which the human male or female bare buttocks, human female bare breasts, or human male or female bare pubic areas are shown, if such motion picture, slide or other exhibit is visible from any public street or public place. Violation (R. 23) of this section shall be punishable as a Class C offense."

2. In March, 1972, plaintiff was charged with a violation thereof by allegedly showing a movie depicting bare female breasts and buttocks on his theatre screen at University Drive-In Theatre entitled "Class of 74" and which were viewable from a public street and public place.

3. There was a stipulation entered into between the prosecuting attorney and defense counsel, and assented to by the Municipal Court, that the prosecution would be held in abeyance pending the entry of a judgment by the Circuit Court in a declaratory judgment action to be filed by the theatre operator in the Circuit Court. The instant suit is the one contemplated by such stipulation and the Municipal Court prosecution has been held in abeyance at least to the date of the entry of this judgment.

4. The only evidence presented by the plaintiff at the final hearing in this cause was undisputed by the defendant, to-wit: that the same movie "Class of 74" was shown at two indoor theatres in Jacksonville shortly before plaintiff was charged with a violation of the subject ordinance on or about March 13, 1972.

5. The evidence of Defendant showed that the picture

screen is easily seen and the pictures are actually viewed by the public from the public streets and other areas in the vicinity and the court takes notice of the fact that children as well as adults make up the public.

6. The crux of plaintiff's claim is that the subject ordinance is unconstitutional on its face. There is no effort (R. 24) to show unconstitutionality in the *application* of the ordinance other than to show that the same movie which may violate the ordinance when shown on an outdoor theatre screen may be shown at an indoor theatre.

Conclusions of Law

1. The Court has jurisdiction of this cause and of the parties hereto and this cause is ripe for a declaration of the rights of the parties.

2. The ordinance in question is constitutional in that it does not violate any protection granted to the plaintiff by the provisions of the Constitutions of the United States of America or the State of Florida.

3. The subject ordinance is a valid exercise of the police power of the defendant City. Under Chapter 67-1320, Laws of Florida, the Charter of the City of Jacksonville, the City has been delegated the broadest powers possible including the power to "make regulations and take actions to promote the general health, welfare and safety of the inhabitants and to prevent, abate and remove nuisances."

4. A municipality's right to declare and abate public nuisances is well grounded in the law. A legislative finding by the City that a certain matter is a public nuisance is entitled to great deference by the Courts and the plaintiff herein has

the burden in demonstrating its invalidity. Plaintiff has not carried that burden.

5. The Court concludes that plaintiff has not demonstrated that the classification established by the ordinance is arbitrary or unreasonable. Indeed, it is apparent that the (R. 25) ordinance is reasonably related to a legitimate legislative purpose and that this court should not substitute its judgment for the legislative body which enacted it.

6. The ordinance is not an obscenity law and it would be error to judge such law by established legal standards of obscenity. However, the Supreme Court has recognized, even in *obscenity* prosecutions, that there are special considerations which are applicable when concern for juveniles in involved. *Redrup* v. *New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed2d 515 (1967).

7. Although there is no evidence before the Court as to the commercial effects on plaintiff's business of the type ordinance involved herein, the restrictions which will be imposed upon plaintiff in the manner of operating his drive-in theatre are reasonable and well within the power of the City to impose. As stated by the Supreme Court:

> "The Constitution's protection of property rights does not make a state or a city impotent to guard its citizens against the annoyances of life because the regulations may restrict the manner of doing a legitimate business."
>
> *Beard* v. *Alexander*, 341 U.S. 632 (1950).

8. As stated in *Chemline, Inc.* v. *City of Grand Prairie*, 346 F.2d 721 (5th Cir. 1966):

> "It is almost self-evident that a city is well within its legitimate police powers in enacting reasonable ordinances to protect children in its public streets and highways from viewing 'bare buttocks' or 'bare female breasts' or 'striptease, burlesque or nudist-type scenes which constitute the main or primary material.'"

Wherefore, it is (R. 26) ORDERED AND ADJUDGED that:

The Court having found the Ordinance 71-552-519 of the City of Jacksonville to be constitutional and a valid exercise of the police power of said city, the plaintiff's prayer for a declaration by this court that said ordinance is unconstitutional is denied.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 30th day of January, A.D., 1973.

(S) MAJOR B. HARDING
JUDGE

(R. 27)

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

[Title Omitted]

NOTICE OF APPEAL

RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre, plaintiff, takes and enters his appeal to the District Court of Appeal, First District of Florida, to review the order, judgment or decree of the Circuit Court for Duval County, bearing date the 30th day of January, 1973, and rendered and recorded in Official Records Volume 3458 at pages 617-621 on January 30, 1973.

The nature of the order appealed from is a final judgment, adverse to the plaintiff, finding a challenged City Ordinance constitutional.

All parties to said cause are called upon to take notice of the entry of this appeal. R. 28)

IN THE CIRCUIT COURT, IN AND FOR DUVAL COUNTY, FLORIDA.

[Title Omitted]

ASSIGNMENTS OF ERROR

Plaintiff-appellant, RICHARD ERZNOZNIK, as Manager of the University Drive-In Theatre, by and through his undersigned attorney, files this his assignment of error as provided by Rule 3.5, Florida Appellate Rules, and says:

1. The Court erred in finding that Jacksonville's City Ordinance No. 71-552-519 is constitutional.

2. The Court erred in failing to find and declare said Ordinance unconstitutional. (R. 30)

IN THE DISTRICT COURT OF APPEAL FIRST DISTRICT OF FLORIDA

No. S - 452

Richard ERZNOZNIK, as Manager of the University Drive-In Theatre,

Appellant,

v.

CITY OF JACKSONVILLE, a municipal corporation, Appellee.

Opinion Filed Jan. 8, 1974. (288 So.2d 260)

Rehearing Denied Feb. 5, 1974.

Appeal from Circuit Court, Duval County; Major B. Harding, Judge.

William H. Maness, Jacksonville, for appellant.

T. Edward Austin, Jr., Ralph W. Nimmons, Jr., and Wayne M. Ellis, Jacksonville, for appellee.

PER CURIAM.

Affirmed. See Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966).

RAWLS, C. J., and SPECTOR and JOHNSON, J.J., concur.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1974

THURSDAY, APRIL 25, 1974

RICHARD ERZNOZNIK, as Manager
of the University Drive-In
Theatre,

Petitioner,

vs.

CITY OF JACKSONVILLE, a
municipal corporation,

Respondent.

CASE NO. 45,004

DISTRICT COURT OF APPEAL,
FIRST DISTRICT

S-452

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, BOYD, DEKLE and OVERTON, J.J., concur

ADKINS, C.J., ERVIN and McCAIN, J.J., dissent

(294 So.2nd 93)